THE SUPREME COURT'S ADJUDICATION OF CONSTITUTIONAL ISSUES IN 1921-1922, II[1]

By THOMAS REED POWELL

II. REGULATION OF COMMERCE

1. *Power of Congress*

QUESTIONS of discrimination in rates or services arising under the Interstate Commerce Act or some of its amendments came before the court in a number of cases without raising any direct constitutional issues.[2] Such an issue, however, was urged against a refusal of the Interstate Commerce Commission to allow a tap line owned by a lumber company more than $3 per car as its share of the joint rate for traffic over it and the main line, but in

---

[1] For the preceding instalment, see 21 MICH. L. REV. 63.

[2] The discrimination unsuccessfully complained of in Central R. Co. v. United States, 257 U. S. —, 42 Sup. Ct. 80 (1921), noted in 35 HARV. L. REV. 769, and 70 U. PA. L. REV. 131, was due to the fact that the carrier on whose line complainant was located afforded no local facility for creosoting lumber in transit, although it maintained joint rates with other carriers which did maintain such facilities on their lines and thereby allowed two physically separate shipments to be rated as one continuous shipment. The court held, however, that neither the original Interstate Commerce Act nor any of its amendments sought to prevent discrimination between different localities except when the discrimination is by the same carrier or carriers. The legality of the action of one carrier could not be determined by the action of another over which it has no control. It was recognized that under a different section of the statute the commission might have ordered that such a transit privilege be given if it regarded the refusal of it as unreasonable or unjust, but it was held that under the clauses relating to discrimination the voluntary action of one carrier does not set a standard to which the others may be compelled to repair.

The question in Pennsylvania R. Co. v. Weber, 257 U. S. —, 42 Sup. Ct. 18 (1921), was whether the court should enforce a reparation order issued by the Interstate Commerce Commission for discrimination against a shipper in the distribution of coal cars when the commission in fixing the amount had improperly used percentages which would have placed the complainant on an equality with the favored competitor. The court reiterated its former ruling that such a basis is erroneous because in effect allowing a claim to a preference, but in the case at bar the amount of the award

Louisiana & P. B. Ry. Co. v. United States[3] the claim that this restriction was so arbitrary as to deny the tap line due process of law was answered by pointing out that the tap line's contention was predicated on the length of a back haul to certain scales which was wholly unnecessary since the weighing might be done by the trunk line, and that any allowance for such unnecessary trips would enable the tap lines to secure rebates for their owners, the lumber companies, as compared with other lumber concerns shipping over tap lines not owned by them. The Commodities Clause of the Hepburn Act contains an exception which permits carriers and lumber companies to be in substance identical. If such a carrier gets more than its fair share of a joint rate, the benefit enures to the lumber company, which thereby in effect gets for its transportation a rate lower than that paid by other lumber companies which, being shippers only and not shippers and carriers combined, get back no part of the bread which they cast upon the waters.[4]

---

was sustained upon the showing that it was not in excess of complainant's actual loss and that if the cars had been evenly distributed he would have received enough to meet all his requirements.

A shipper who complained that it had not received its fair share of coal cars was sent away comfortless and rebuked in Lambert Run Coal Co. v. Baltimore & Ohio R. Co., 258 U. S. —, 42 Sup. Ct. 349 (1922), when it appeared that its complaint concealed the fact that the distribution actually made was in accordance with the prescription of the Interstate Commerce Commission acting under the authority of emergency powers conferred upon it. The bill was therefore in reality one to set aside the order of the commission, and it failed because the United States was not made a party and because it was brought in the state court. The latter defect was not cured by removal to a federal court at the request of the defendant, since the federal court acquires no jurisdiction by removal from a state court which is without jurisdiction, even though the proceeding might originally have been brought in the federal court.

[3] 257 U. S. —, 42 Sup. Ct. 25 (1921).

[4] The established rule that the Carmack Amendment has made the liability of carriers for loss of goods in interstate transit a matter of federal law was reiterated in Chicago & N. W. Ry. Co. v. Whitnack Produce Co., 258 U. S. —, 42 Sup. Ct. 328 (1922), which applied a common-law principle acceptable to the federal courts to hold the ultimate carrier liable for the damage when it could not prove that it received the goods in undamaged condition. The provision of the Carmack Amendment allowing suit against the initial carrier was treated as a congressional donation of an extra right of action but not an exclusive one. But the optional action was, of course, not conferred by the law of any state. It came from "common-law prin-

The Transportation Act of 1920 brought a number of cases before the court. This directed the Interstate Commerce Commission to establish and adjust rates with the general object of securing a reasonable return to the roads and enabling them to enlarge their facilities so as to provide adequate transportation. It further commanded the Commission to prescribe the rates so as to remove any

---

ciples accepted and enforced in the federal courts." The particular rule applied in this case had not previously been recognized by the Supreme Court, but Mr. Justice McReynolds said that it is a good rule, and so by the decision it became an accepted federal rule. This seems sensible, though it is a little tough on those two revered maxims that there is no federal common law and that the courts do not make law. Mr. Justice Clarke did not sit.

The ultimate carrier was more fortunate in the "settled federal rule" applied in Oregon-Washington R. & N. Co. v. McGinn, 258 U. S. —, 42 Sup. Ct. 332 (1922), noted in 26 HARV. L. REV. 109 and 32 YALE L. J. 84, which relieved it from liability for an injury to livestock caused by an intermediate carrier when the bill of lading stipulated that "except as otherwise provided by statute" no carrier should be liable for a loss not caused by it. The only contrary provision in the Carmack (now the Cummins) Amendment was confined to the initial carrier, so the stipulation in the bill of lading exonerated the ultimate carrier. The shipper was unfortunate in picking a lawyer who picked as a defendant the only one of three carriers which had a good defense.

Gooch v. Oregon Short Line R. Co., 257 U. S. —, 42 Sup. Ct. 192 (1922), noted in 20 MICH. L. REV. 668, and 31 YALE L. J. 887, held valid a stipulation in a drover's pass that the carrier should not be liable for an injury to him unless he gave notice in writing of the injury within thirty days after it occurred. Mr. Justice Pitney did not sit; Mr. Justice Clarke wrote a dissenting opinion in which Chief Justice Taft and Mr. Justice McKenna joined.

For discussions of federal regulation of liability in connection with interstate shipments, see Edgar Watkins, "Liability of Consignors and Consignees of Interstate Shipments for Unpaid Freight Charges," 6 MINN. L. REV. 23; and notes in 22 COLUM. L. REV. 564 on rights under contracts in violation of the Interstate Commerce Act; 10 GEORGETOWN L. J. (No. 1) 70 on limiting liability under the Carmack Amendment; 20 MICH. L. REV. 348 on what is a shipment within the Cummins Amendment; 20 MICH. L. REV. 350 on Michigan Central R. Co. v. Owen, 256 U. S. —, 41 Sup. Ct. 554 (1921); 20 MICH. L. REV. 445 on Western Union Tel. Co. v. Esteve Brothers Co., 256 U. S. —, 41 Sup. Ct. 584 (1921), 19 MICH. L. REV. 138; 20 MICH. L. REV. 765 on rules of liability under the second Cummins Amendment; 6 MINN. L. REV. 157 on Union Pacific Ry. Co. v. Burke, 255 U. S. 317, 41 Sup. Ct. 283 (1921), 19 MICH. L. REV. 139, note 14; and 8 VA. L. REV. 214 on limitation of liability in shipment to non-adjacent foreign country.

undue or unreasonable advantage as "between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other," and in addition "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful." A further clause declared explicitly that rates so fixed by the Commission should be observed, "the law of any state or the decision or order of any state authority to the contrary notwithstanding." In execution of the authority thus vested, the Commission raised interstate rates throughout the country and then ordered certain intrastate rates to be raised in order to prevent discrimination against persons and localities in interstate commerce and discrimination against interstate commerce generally. The refusal of two state commissions to authorize the raising of intrastate rates to the full extent commanded by the federal Commission left the roads subject to contradictory orders and brought the issue to the Supreme Court for solution.

Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.[5] was a suit by a railroad to enjoin a state commission from interfering with the maintenance of the intrastate rates established by the federal Commission. In so far as the order was predicated on the necessity of removing discrimination against persons and localities in interstate commerce, the Supreme Court found it too broad and sweeping, since it included intrastate traffic that might not in any sense compete with interstate traffic. The remaining question was whether the order was justified as an effort to remove discrimination against interstate commerce as a whole. Most of the opinion of Chief Justice Taft is concerned with the question whether the statute authorized the Commission to raise local rates generally in order to prevent discrimination against interstate rates generally. This was answered in the affirmative. It was when dealing with the issue of statutory construction that the chief justice pointed out that "if the railways are to earn a fixed net percentage of income, the lower the intrastate rates the higher the interstate rates may have to be." The idea seems to be that the total return of the roads is fixed by economics and by Congress and

---

[5] 258 U. S. —, 42 Sup. Ct. 232 (1922). See 10 GEORGETOWN L. J. (No. 3) 78; 35 HARV. L. REV. 864, 886; 20 MICH. L. REV. 675; 6 MINN. L. REV. 520; 8 VA. L. REV. 615; and 31 YALE L. J. 870. For references to discussions prior to the Supreme Court decision, see 19 MICH. L. REV. 140, note 18.

that the power of Congress to raise local rates rests not so much on their direct contribution to the total return as on their bearing on the proportionate contribution to that return made by the interstate rates. This, however, is a matter of inference rather than of explicit statement. The chief justice disposes of the constitutional issue very briefly. After saying that the *Shreveport* case and others "leave no room for discussion on this point," he continues:

"Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The states are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. * * * In such development, it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of national power in this field."

To this is added the qualification that it does not sustain general federal regulation of intrastate commerce and that the action of the federal Commission "should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce," and must leave to the states appropriate discretion to adjust intrastate rates as between themselves on the general level found by the federal Commission to be fair to interstate commerce. It is also suggested that if state commissions recognize their duty to give the roads a proportionate return from local business, conference between state and federal commissions may well result in leaving the former with power to alter the local rates in their discretion.

The same rulings were made in *New York v. United States,*[6]

---

[6] 258 U. S. —, 42 Sup. Ct. 239 (1922). This case is discussed in many of the editorial notes cited in note 45 *supra*.

which was a direct proceeding to set aside the order of the federal Commission. Here there was the further objection that one of the carriers was obligated to the state by a "charter contract" to keep certain passenger fares at two cents per mile. This was answered by pointing out that the obligation-of-contracts clause is not directed against the federal government and by quoting from an earlier opinion that "anything which directly obstructs and thus regulates that commerce which is carried on among the states, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce." No reference was made to the possibility of a somewhat more intricate contention that a railroad corporation without charter power to charge more than two cents must get this power from the grantor of its charter before it may exercise it. Such a contention, however, would readily fail, in view of the recent declension of the doctrine of "unconstitutional conditions."[7]

Another provision of the Transportation Act of 1920 forbade the abandonment of any line or portion of line of railroad without the consent of the Interstate Commerce Commission, provided for hearings upon petitions to abandon, and declared that upon the issue of a certificate by the Commission the carrier may take the action thus permitted without securing any other approval. *Texas v. Eastern Texas R. Co.*[8] involved the validity of a certificate of the Commission permitting the complete abandonment of a railroad wholly in Texas that was only thirty miles long and not a part of any larger system. Three-fourths of the traffic was interstate or foreign, and the power of Congress and of the Commission to permit the discontinuance of this traffic was not questioned. The local traffic, however, was held to be of no concern to interstate commerce and so not within the purview of the authority delegated to the Commission by Congress. This restriction of the general language of the Transportation Act was confessedly influenced by the consideration that an opposite construction would raise a serious question of constitutional validity. The decision, therefore, throws light on the Supreme

[7] See Terral v. Burke Construction Co., 257 U. S. —, 42 Sup. Ct. 188 (1922), to be reviewed in ensuing sections on police power and on intergovernmental relations.

[8] 258 U. S. —, 42 Sup. Ct. 281 (1922).

Court's idea of the constitutional limit of the commerce power of Congress, even though it is not a technical adjudication of a constitutional issue. In the course of the opinion Mr. Justice Van Devanter emphasized the fact that the isolated situation and separate ownership of the particular line make it of no concern to interstate commerce whether the local traffic is continued or abandoned. He pointed out, too, that all the legislation of Congress in the Interstate Commerce Act and its amendments manifests "a continuing purpose to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exercise of the power of Congress over interstate and foreign commerce." The question whether the road might abandon its local business quite aside from the consent of the Interstate Commerce Commission was declared to be not before the court.[9]

The Merchant Marine Act of 1920 restricted coastwise water transportation to United States vessels with a proviso that under certain conditions the limitation shall not apply to transportation between United States points, exclusive of Alaska, by Canadian rail lines and connecting water facilities over through routes. This exception of Alaska moved the territory to complain that Congress

[9] The validity of the Transportation Act was questioned generally in Texas v. Interstate Commerce Commission, 258 U. S. —, 42 Sup. Ct. 261 (1922),in an original proceeding in the Supreme Court, but the bill was dismissed on the ground that many of the issues raised presented no concrete dispute between parties actually affected, and therefore the proceeding was not a "case or controversy within the range of the judicial power as defined by the Constitution," and on the further ground that other issues as to the action of the Railroad Labor Board involved the interests of carriers and their employees and could not be determined in a proceeding to which they are not parties. For a note on the constitutional powers of the Railroad Labor Board, see 70 U. PA. L. REV. 316.

In Great Northern Ry. Co. v. Merchants' Elevator Co., 259 U. S. —, 42 Sup. Ct. 477 (1922), the question whether cars were held on tracks for inspection and disposition orders incident thereto so as to come within an exception to a tariff provision charging $5 per car for reconsignment was said to be purely a question of construction of the tariff, involving no issue of fact or of administrative discretion, and therefore a question which may be decided by a state court in an action for the recovery of freight alleged to have been demanded unlawfully, without preliminary resort to the Interstate Commerce Commission. The opinion of Mr. Justice Brandeis reviews at some length the cases on the distinction between the issues requiring preliminary determination by the commission and those which do not.

had violated the constitutional provision which declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another." In *Alaska v. Troy*[10] Mr. Justice McReynolds answered that Alaska is not a state within the meaning of the clause relied on. The regulation was said to relate directly to commerce and so to be outside the scope of the constitutional provision requiring all duties, imposts and excises to be uniform throughout the United States.[11]

The scope of the federal Employers' Liability Law came before the court in *Industrial Accident Commission v. Payne*,[12] which, in applying the announced test of whether the employee at the time of his injury is engaged in interstate transportation or any work so closely related to it as to be practically a part of it, held that an engine off duty for a month while being repaired in the shop had ceased for the time to be an instrumentality of interstate commerce, so that a repairman injured at his task was not precluded from the benefits of a state compensation act. The situation was distinguished from that of an engine merely "interrupted in an interstate haul to be repaired and go on." How nice may be the distinction is recognized by Mr. Justice McKenna when he says:

"Further discussion is unnecessary, though we are besought to declare a standard invariable by circumstances or free from confusion by them in application. If that were ever possible, it is not so now. Besides, things do not have to be in broad contrast to have different practical and legal consequences. Actions take estimations from degrees, and of this life and law are replete with examples."[13]

---

[10] 258 U. S. —, 42 Sup. Ct. 241 (1922).

[11] For discussions of Economy Light & Power Co. v. United States, 256 U. S. —, 41 Sup. Ct. 409 (1921), 20 MICH. L. REV. 135, relating to national control of navigable rivers, see Merritt Starr, "Navigable Waters of the United States—State and National Control," 35 HARV. L. REV. 154; and a note in 17 ILL. L. REV. 61.

[12] 259 U. S. —, 42 Sup. Ct. 489 (1922). See 32 YALE L. J. 89.

[13] The Employers' Liability Law abolishes the fellow-servant rule, but merely modifies the assumption-of-risk rules. A crafty attempt to embrace the former within the latter failed in Reed v. Director General of Railroads, 257 U. S. —, 42 Sup. Ct. 191 (1922), noted in 31 YALE L. J. 784, which held that a brakeman does not assume the risk of the engineer's negligence which could not have been foreseen.

The question whether injuries are within the Employers' Liability Law

Some antiquarian interest may perhaps attach to *Rainier Brewing Co. v. Great Northern Pacific S. S. Co.,*[14] which applied a combination of the Webb-Kenyon Law, a state law prohibiting shipments of liquor except to consignees with permits, and Section 240 of the federal Criminal Code requiring all interstate shipments of liquor to be emblazoned with announcements of their intoxicating characteristics, and thereby held that an interstate carrier was justified in refusing to ship in carload lots to a transfer company 2,565 separate packages or cases of beer addressed to separate individuals. The railroad's virtue had its due reward, for the liquor was rebilled and each separate package consigned and delivered to its individual consignee, and in the case at bar the carrier recovered from the shipper the excess of the less-than-carload rate over the carload rate. While no constitutional issue was contested, the decision necessarily reaffirms the validity of the Webb-Kenyon Law forbidding the interstate transportation of liquor intended by any person interested therein to be received, possessed, or used in violation of the law of the state of destination.[15]

The Packers and Stockyards Act of 1921 established federal control over stockyards and the commission men buying and selling cattle therein, and authorized the secretary of agriculture to regulate the rates and charges for services and facilities in the yards. In a proceeding to enjoin public officials from enforcing the act, *Stafford v. Wallace*[16] held that the yards and commission men are in a practical sense facilities of interstate commerce, since the transactions in the yards cannot be separated from the movement from pasture to table. In the happy or unhappy figure of Chief Justice Taft, "the stockyards are but a throat through which the current

is considered in 10 GEORGETOWN L. J. (No. 1) 67; 8 VA. L. REV. 132; and 31 YALE L. J. 96; also in 70 U. PA. L. REV. 115, a note on Philadelphia & Reading Ry. v. Polk, 256 U. S. —, 41 Sup. Ct. 518 (1921), 20 MICH. L. REV. 143.

[14] 259 U. S. —, 42 Sup. Ct. 436 (1922).

[15] A case holding that the Reed Amendment, which forbids the transportation of intoxicating liquor into any state whose laws forbid its manufacture or sale for beverage purposes, applies when a state constitution makes the traffic unlawful, even though no enforcing legislation has been passed, is noted in 22 COLUM. L. REV. 174.

[16] 259 U. S. —, 42 Sup. Ct. 397 (1922). For a note on the Packers' Act, see 22 COLUM. L. REV. 68.

flows, and the transactions which occur therein are only incident to this current from the west to the east, and from one state to another." While the sales in the yards ereate a local change of title, "they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity." In an extended review of previous decisions, the chief justice points out that property or transactions which may be sufficiently disconnected from interstate commerce to be subject to state taxation may still be sufficiently a part of that commerce to be subject to the regulatory power of Congress to the extent of their effect on interstate commerce. He relied, too, on other cases decided during the current term which invoked the commerce clause against state police and fiscal measures whose primary incidence was on technically local tentacles of interstate commerce, and he compared the Packers Act with the Transportation Act in justifiably dealing with intrinsically local matters so as to prevent their deleterious influence on interstate commerce. The business of the stockyards was declared to be one affected with a public interest so as to justify public regulation of the rates for services and facilities. Mr. Justice McReynolds dissented and Mr. Justice Day did not sit.

The Grain Future Trading Act of August 24, 1921, purported to levy a tax of twenty cents a bushel on all contracts for the sale of grain for future delivery unless made by persons or methods approved by designated federal authorities. In *Hill v. Wallace*[17] the demand was declared to be not a tax but a penalty for doing business in unapproved ways. This brought the court to the question whether the regulation could be sustained as one of interstate commerce. According to the bill before the court, the transactions involved would be settled by offsetting purchases against each other or by delivery of warehouse receipts of grain stored in Chicago. Such sales, declared Chief Justice Taft, "are not in and of themselves interstate commerce" and "cannot come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon." An analysis of the act convinced the court that Congress predicated its

[17] 259 U. S. —, 42 Sup. Ct. 453 (1922).

validity on the taxing power without having the commerce clause in mind, and thus did not introduce the limitations which appropriately would accompany and mark an exercise of commerce power. Mr. Justice Brandeis wrote a separate concurring opinion, agreeing that the statute is unconstitutional, but doubting whether the question was properly raised in the proceeding before the court.

The Sherman Law was the foundation of the civil action for triple damages in which a verdict for the plaintiffs below was set aside in *United Mine Workers of America v. Coronado Coal Co.*[18] This was a suit by a coal company against several labor unions and their officers for damages due to violence which injured the plaintiff's plant and seriously interrupted the operation of its mines. One of the defendants was the United Mine Workers of America. The verdict against it was set aside because the Supreme Court found that there was not sufficient evidence to connect it or its officers with the wrongs complained of. The other defendants were District 21 of the United Mine Workers and its officers, 27 local unions of this district and their officers, and 67 individuals, some union men and some not. The verdict against all these defendants was set aside because the Supreme Court found that there was not sufficient evidence to warrant the jury in finding that the conspiracy was with intent to restrain or monopolize interstate commerce. The quarrel arose out of the employer's breach of contract with the local district, "his attempt to evade his obligation by a hugger-mugger of his numerous corporations," and other acts of a local character arousing resentment because of the local situation, so that the whole affair related primarily to mining and only remotely to interstate trade in coal. While seventy-five per cent of the product of the mines in question was customarily shipped in interstate commerce, this amounted to only 5,000 tons a week and could have no appreciable effect upon the price of coal generally or upon non-union competition throughout the country. The announced ambition of the United Mine Workers of America to unionize all the coal fields of the country in order, among other things, to prevent interstate trade in non-union coal from interfering with interstate trade in union coal, was dismissed as immaterial in view of the fact that the national body

---

[18] 259 U. S. —, 42 Sup. Ct. 570 (1922). See 10 CALIF. L. REV. 506; 22 COLUM. L. REV. 684; and 32 YALE L. J. 37.

had not participated in the particular local strike. While the local riot resulted in burning a car loaded with coal billed to another state, the car had served as a rampart in the fight, and its burning was only a part of the general destruction. Such are the salient facts detailed in the opinion of Chief Justice Taft to show that the issue and the results were confined to mining and did not embrace disposition of the product. "Coal mining," he says, "is not interstate commerce, and obstruction of coal mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce, unless the obstruction to mining is intended to restrain commerce in it, or has necessarily such a direct, material, and substantial effect to restrain it that the intent reasonably must be inferred." Here is a hint that the amount of production involved in a strike may determine whether the effect upon interstate commerce is sufficient to bring the conspiracy within the Sherman Law. From two of the chief justice's sentences, isolated from their context, one might infer that Congress might constitutionally legislate explicitly to deal with such a situation as that disclosed in the case at bar. After citing the *Swift* case and the decisions of the current term sustaining the Transportation Act and the Packers and Stockyards Act, he says that "if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint," and that "it has the power to punish conspiracies in which such practices are part of a plan to hinder, restrain, or monopolize interstate commerce." But this is qualified by adding that "in the latter case the intent to injure, obstruct, or restrain interstate commerce must appear as an obvious consequence of what is to be done, or be shown by direct evidence or other circumstances." The earlier sentence speaks of *recurring* practices, and thus very likely excludes sporadic rows. In practice, of course, each case will depend on its own facts, and there will always be enough relation to interstate trade to bring within federal regulation any conspiracy that the court thinks ought to be embraced therein.[19]

[19] The points covered in the text were the third and fourth considered by the court. Their determination in favor of the defendants disposed of the controversy and, as Chief Justice Taft points out, made it unnecessary to "examine the objection which the plaintiffs in error make to the supplemental charge of the court" that it so reviewed the evidence "as to

Another case which excluded from the Sherman Law an alleged restraint of trade on the ground that interstate commerce was not directly involved is *Federal Base Ball Club v. National League*,[20] in which a former constituent member of one national base ball organization was deprived of a verdict and triple damages obtained in the district court against another national base ball organization which had lured away or purchased its fellow members and so broken up the organization. Mr. Justice Holmes introduces the idea that base ball exhibitions are not only not interstate commerce but also not commerce at all when he says:

"The business is giving exhibitions of base ball, which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and states. But the

---

amount to a mandatory direction coercing the jury into finding the verdict which was recorded," which was the fifth point listed by the chief justice as pressed by the plaintiffs in error. The same attitude might have been taken toward the first two points, which, nevertheless, the court considered and decided in favor of the employer, though this in no way affected the disposition of the controversy. Thus the chief justice laid down, first, that there was not a misjoinder of parties under the procedure as authorized in Arkansas, and second, that "the unincorporated associations, the International Union [United Mine Workers of America], District No. 21, and the local unions" were "suable in their own names" as "associations existing under or authorized by the laws of the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country," as specified in Sections 7 and 8 of the Sherman Law. It was recognized that at common law such associations could not be sued in their own names and that liability had to be enforced against each individual member; but the opinion enumerated many federal and state statutes which gave special recognition to labor unions, and found that the time had come when such unions had acquired concentrated strength and the faculty of quick unit action so as to become a self-acting body with great funds to accomplish their purpose. Similar business and trade associations had been made parties to suits under the Sherman Law without question. The question was called essentially one of procedure, but it was laid down that the fact that the Arkansas court has since taken a different view "cannot under the Conformity Act operate as a limitation on the federal procedure in this regard."

For a consideration of the Sherman Act as the foundation of an injunction against strikes to get men to join a union in breach of contract, see 35 HARV. L. REV. 459, 474.

[20] 259 U. S. —, 42 Sup. Ct. 465 (1922). For discussions prior to the decision, see 34 HARV. L. REV. 559, and 19 MICH. L. REV. 867.

fact that in order to give the exhibitions the leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in *Hooper v. California*, 155 U. S. 648, 655, the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money, would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendant, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the states because the transportation that we have mentioned takes place. To repeat the illustrations given by the court below [the Circuit Court of Appeals], a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or the lecturer goes to another state."

There was, of course, no question that interstate commerce was involved in two cases relating to the unscrambling of mergers in which interstate railroads were ingredients. In *United States v. Southern Pacific Co.*[21] the defendant was required to disassociate itself from the Central Pacific Railroad, with which it had been intermingled since 1885, first by becoming its lessee for a term of 99 years and later by acquiring by purchase all its stock. What was once an open constitutional issue was one no longer, since, as Mr. Justice Day observed, "it is authoritatively settled by decisions of this court that no previous contracts or combinations can prevent the application of the Sherman Act to compel the discontinuance of illegal combinations." The chief harm of the combination in question seemed to be that the Southern Pacific diverted traffic from the Central Pacific and thereby secured for itself a haul clear across the continent to the exclusion of other lines that connected with the Central Pacific. Mr. Justice McKenna dissented because he thought Congress had long since condoned the union in question.

The second railroad case is *Continental Insurance Co. v. Reading Co.*,[22] which was an appeal from the district court from a decree entered in pursuance of a mandate from the Supreme Court in a

---

[21] 259 U. S. —, 42 Sup. Ct. 496 (1922).
[22] 259 U. S. —, 42 Sup. Ct. 540 (1922).

prior decision ordering the severance of the Reading railroad system from other railroads and from coal mines. The process required some alteration of the securities given to mortgagees of the dissolving combination in order to prevent the severed members from having such mutual interests in each other's solvency and prosperity that the economic nexus would perpetuate the combination even after the legal nexus was cut. The court expressed its desire not to vary the security of the bondholders more than necessary to carry out the purpose of the law, but it had no doubt of its power to command such shifting as it deemed in fact necessary for this purpose. Chief Justice Taft pointed out that the general mortgage covering both railroad and coal properties "was the indispensable instrument of the unlawful conspiracy to restrain interstate commerce" and that "it was the advantage of the legally improper relation between the railway and coal interests which made the security so attractive." Therefore, the fact that the severance of the properties as security for the mortgage might impair that security could not stand in the way of preventing the perpetuation of the wrong which their union made possible.

The Federal Trade Commission Act of September 26, 1914, condemns "unfair methods of competition" without specifying what is to be deemed unfair. The Trade Commission is given authority, after a hearing, to issue orders compelling the discontinuance of such methods. Naturally, the Supreme Court would not brand as "unfair" any practice it thought too commendable or too innocuous to be constitutionally subject to explicit congressional condemnation. It follows that cases upholding the action of the Trade Commission show that any due-process objection would have been in vain. Two such cases were decided during the past term. *Federal Trade Commission v. Winsted Hosiery Co.*[23] put an end to the use of labels containing the words "merino," "wool" or "worsted" on underwear made partly of cotton. The circuit court of appeals had accepted the contention that such labels had so long been used for articles to which sheep had contributed only a part that they had lost their

[23] 258 U. S. —, 42 Sup. Ct. 384 (1922). See 22 COLUM. L. REV. 593, and 20 MICH. L. REV. 122. For discussions of the same controversy, see 21 COLUM. L. REV. 721, and 20 MICH. L. REV. 781.

power to deceive, and Mr. Justice McReynolds apparently agreed, for he dissented. For the majority, Mr. Justice Brandeis insisted that the labels are literally deceptive and practically would aid in deceiving and thereby be unfair as against purchasers and as against rival dealers in all-wool garments and in confessedly part-cotton materials.

Federal Trade Commission v. Beech-Nut Packing Co.[24] condemned a scheme of retail price-fixing made effective by announcements, listing, observing, reporting, refusals to sell, etc., though without explicit contractual arrangements. Justices Holmes, McKenna, Brandeis and McReynolds dissented. In both of these cases the defendants sold for shipment to other states than that of manufacture, so that there was no dispute that the commerce involved was interstate.[25]

Issues of due process and of the commerce clause were adjudicated in *United Shoe Machinery Corporation v. United States*,[26] which found the leasing system of the plaintiff in error within the prohibition of Section 3 of the Clayton Act against leases of machinery, etc., whether patented or unpatented, or fixing prices therefor on condition, agreement, or understanding that the lessee shall refrain from using the machinery, etc., of a competitor, where the effect of such arrangement "may be to substantially lessen competition or tend to create a monopoly." The court recognized that the mere making of the lease is not of itself interstate commerce, but it declared that, in so far as the machines so leased are shipped across state lines as part of the transaction, there is no doubt of the power of Congress to control the making of the lease. The due-process

---

[24] 257 U. S. —, 42 Sup. Ct. 150 (1922). See 10 CALIF. L. REV. 229; 22 COLUM. L. REV. 351; 35 HARV. L. REV. 772; 4 ILL. L. QUART. 263; 20 MICH. L. REV. 904; 6 MINN. L. REV. 336; 70 U. PA. L. REV. 198; 8 VA. L. REV. 603; and 31 YALE L. J. 650.

[25] Consideration of the Trade Commission and its functions appears in Minor Bronough, "The Federal Trade Commission—Its Powers and Functions," 27 LAW NOTES 45; W. T. Holliday, "The Federal Trade Commission," 8 A. B. A. JOUR. 293; Herman Oliphant, "The Federal Trade Commission," 7 A. B. A. JOUR. 594; and Myron W. Watkins, "The Change in Trust Policy," 35 HARV. L. REV. 815, 926.

[26] 258 U. S. —, 42 Sup. Ct. 363 (1922). See 10 CALIF. L. REV. 425, 36 HARV. L. REV. 86, 111, and 20 MICH. L. REV. 911.

complaint was that the restriction on such leases took rights acquired from the grant of a patent on the machines, but the restriction against the use of other articles than those embraced in the lease was declared to be no part of the patentee's exclusive right to make, use and sell the machine covered by the patent. These leases had been held immune from criticism under the Sherman law, but this was held to confer no protection against the later more explicit prohibition of the Clayton Act. Mr. Justice McKenna dissented and Mr. Justice Brandeis did not sit.

The Clayton Act was similarly applied in *Standard Fashion Co. v. Magrane-Houston Co.*[27] to declare invalid a contract whereby purchasers of patterns agreed to maintain designated re-sale prices and not to deal in rival patterns. The offending concern contended that its contracts were ones of agency and not of sale, but the court unanimously saw through the verbal disguise.[28]

No such harmony prevailed in *American Column & Lumber Co. v. United States*,[29] in which the "open competition plan" of the American Hardwood Manufacturers' Association was declared obnoxious to the Sherman Law, over the dissent of Justices Bran-

---

[27] 258 U. S. —, 42 Sup. Ct. 360 (1922). See 21 MICH. L. REV. 95 and 36 HARV. L. REV. 86, 111.

[28] The Clayton Act came in for consideration in American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. —, 42 Sup. Ct. 72 (1922), (noted in 10 GEORGETOWN L. J. (No. 3) 94; 6 MINN. L. REV. 252; 70 U. PA. L. REV. 102; 8 VA. L. REV. 298; and 31 YALE L. J. 408), not from the standpoint of interstate commerce, but as a restriction on the power of the federal courts to issue injunctions in labor disputes. The case apparently got into the federal court solely by reason of diversity of citizenship, and the injunction against picketing was based on the Supreme Court's idea of the common-law principles of actionable wrong. The Clayton Act, however, forbade federal courts to enjoin persons from peacefully persuading others not to work, etc. The limit of peacefulness laid down by Chief Justice Taft was one representative at each point of ingress and egress under the circumstances disclosed in the particular case. It was recognized that other situations might warrant more latitude. Mr. Justice Clarke dissented and Mr. Justice Brandeis confined his concurrence to the result.

The Clayton Act is considered in the article by Mr. Watkins cited in note 65, *supra*, and in a note in 31 YALE L. J. 668 on unfair trade through refilling acetylene tanks.

[29] 257 U. S. —, 42 Sup. Ct. 114 (1921). See 10 CALIF. L. REV. 350; 22 COLUM. L. REV. 377; 20 MICH. L. REV. 901; 6 MINN. L. REV. 329; 8 VA. L. REV. 621; and 31 YALE L. J. 643.

deis, McKenna and Holmes. On its face the competing producers merely exchanged information as to stocks on hand, volume of sales, prices and other market conditions, but Mr. Justice Clarke for the majority insisted that the plan included polite methods of restricting production in order to maintain high price levels. The minority emphasized the absence of proof of actual restriction of production and regarded the plan as in general one to provide the same sort of information for the lumber industry as the government furnishes with respect to grain, cotton, coal and oil. Mr. Justice Brandeis pointed out the incongruity of condemning those who produce only one-third of the hardwood lumber of the country to refrain from helpful coöperation when it had already been held that it is not unlawful for the United States Steel Corporation to control fifty per cent of the steel industry or the United Shoe Machinery Company to monopolize practically the whole shoe machinery industry.

2. *State Police Power and Interstate Commerce*

The contention of a Tennessee corporate miller that its cotton gin in Mississippi was essential to the acquisition of cotton seed to be shipped in interstate commerce to its Tennessee oil mill, and that therefore a Mississippi statute divorcing cotton ginning from the manufacture of cotton-seed oil or meal was an invalid burden on interstate commerce, was rejected in *Crescent Cotton Oil Co. v. Mississippi.*[30] In support of this result Mr. Justice Clarke declared:

"The separation of the seed from the fibre of the cotton, which is accomplished by the use of the cotton gin, is a short, but important, step in the manufacture of both the seed and the fibre into useful articles of commerce; but that manufacture is not commerce, was held in * * * the cases cited. And the fact, of itself, that an article when in process of manufacture is intended for export to another state does not render it an article of interstate commerce. * * * When the ginning is completed the operator of the gin is free to purchase the seed or not, and, if it is purchased, to store it in Mississippi indefinitely, or to sell or use it in that state, or to ship it out of the state for use in another, and, under the cases cited, it is only in this last case, and after the seed has been committed to a carrier for interstate transport, that it passes from the regulatory

[30] 257 U. S. —, 42 Sup. Ct. 42 (1921).

power of the state into interstate commerce and under the national power.

"The application of these conclusions of law to the manufacturing operations of the cotton gins, which we have seen precede, but are not a part of, interstate commerce, renders it quite impossible to consider them an instrumentality of such commerce, which is burdened by the Anti-Gin Act. * * *"

A Kentucky statute closing the doors of the state court to suits by foreign corporations not duly registered in the state was declared in *Dahnke-Walker Milling Co. v. Bondurant*[31] to be inapplicable to a suit brought by a Tennessee corporation against a Kentucky farmer for breach of a contract to deliver grain to a carrier in Kentucky for shipment to the plaintiff's mill in Tennessee. The defendant contended that the transaction was not interstate commerce since it was for the purchase of grain to be delivered in the same state in which the grain grew; and the state court, with apparent warrant in prior Supreme Court decisions, decided in his favor. In explaining why the state court erred, Mr. Justice Van Devanter declared that "where goods are purchased in one state for transportation to another, the interstate commerce includes the purchase quite as much as it does the transportation," and that if the transportation is incidental to buying or selling there is no difference between transporting for sale to another state and buying for transportation to another state. To this he added:

"The state court, stressing the fact that the contract was made in Kentucky and was to be performed there, put aside the further facts that the delivery was to be on board the cars and that the plaintiff, in continuance of its prior practice, was purchasing the grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing and should have been considered. They showed that what otherwise seemed an intrastate transaction was a part of interstate commerce. * * * The state court also attached some importance to the fact that after the grain was delivered on the cars the plaintiff might have changed its mind and have sold the grain at the place of delivery or have shipped it to another point in Kentucky. No doubt this was possible, but it also was improbable. With equal basis it could be said that a shipment of merchandise

[31] 257 U. S. —, 42 Sup. Ct. 106 (1921). See 6 MINN. L. REV. 317.

billed to a point beyond the state of its origin might be halted by the shipper in the exercise of the right of stoppage in transitu before it got out of that state. The essential character of the transaction as otherwise fixed is not changed by a mere possibility of that sort. * * *

"For these reasons we are of opinion that the transaction was a part of interstate commerce, in which the plaintiff lawfully could engage without any permission from the state of Kentucky, and that the statute in question, which concededly imposed burdensome conditions, was as to that transaction invalid because repugnant to the commerce clause."

The court went still farther in *Lemke v. Farmers' Grain Co.*,[32] which held that the purchase of grain in North Dakota by a North Dakota elevator from a North Dakota farmer is part of an interstate commerce transaction when the general and usual course of business involves the speedy shipment of the grain to points in other states. The state statute declared unconstitutional as a regulation of interstate commerce required the elevators to be licensed and to pay a fee, to comply with a system of inspecting, weighing and grading, and to pay the seller the prices established by a state commission. Mr. Justice Day, for the majority, implies that some of the requirements might be proper if not inseparably connected with the price-fixing provision, but he finds the latter essential to the manifest purpose of the statute, so that the whole act must fall together. For the minority, Mr. Justice Brandeis contends that the legislature would clearly have wished to protect the farmers against fraudulent weighing and grading, even if it could not have prescribed a minimum price, and he therefore complains that the majority did not save as much of the act as might be deemed to affect interstate commerce only incidentally. Justices Holmes and Clarke shared his regret. The minority opinion waives the question whether the transactions were part of interstate commerce as not necessary to decide, in view of the principle that state prescriptions are not regulations of such commerce when they merely incidentally affect it. The majority do not consider whether the state statute was in conflict with the federal Grain Standards Act, since they hold it invalid even in the absence of conflicting congressional action. The decree

[32] 258 U. S. —, 42 Sup. Ct. 244 (1922). See 10 GEORGETOWN L. J. (No. 3) 76; 35 HARV. L. REV. 883; and 6 MINN. L. REV. 521.

was that the enforcement of the entire statute should be enjoined. The same action was taken in *Lemke v. Homer Farmers' Elevator Co.*,[33] decided on the same day over the same dissent.

A Georgia statute requiring inspection of inflammable oils and imposing fees therefor which more than covered the cost of inspection came before the court in *Texas Co. v. Brown*,[34] in which Mr. Justice Pitney observed that it is well settled that "a state is within its governmental powers in requiring inspection, including tests as to quality, as a safeguard with respect to inflammable substances such as those here involved, when found within its borders, or even when moving in commerce from state to state (there being no legislation by Congress upon the subject)." The issue with regard to the fees is presented in the immediately succeeding sub-section on state taxation and interstate commerce.

The remaining cases concern state power after congressional action, and have already been noted in the preceding sub-section on the power of Congress. *Industrial Accident Commission v. Payne*[35] holds that the repair of an engine removed from interstate commerce and in the shops for a month is not a work of interstate commerce and that therefore an injury to the repairman may entitle him to compensation under state law.[36] *Rainier Brewing Co. v. Great Northern Pacific S. S. Co.*[37] illustrates the application of state police laws to interstate shipments of intoxicating liquor after the shipment has been made unlawful by the federal Webb-Kenyon law. *Chicago & N. W. Ry. Co. v. Whitnack Produce Co.*[38] and *Oregon-Washington R. & N. Co. v. McGinn*[39] show that the Carmack and

---

33 258 U. S. —, 42 Sup. Ct. 250 (1922). An analogous issue is discussed in 6 MINN. L. REV. 61, 69.

34 258 U. S. —, 42 Sup. Ct. 375 (1922).

35 259 U. S. —, 42 Sup. Ct. 489 (1922). See 32 YALE L. J. 89.

36 In 21 COLUM. L. REV. 725 is a note on an action under state law against one joint tortfeasor after recovery against the other under the federal Employers' Liability Law. In 6 MINN. L. REV. 63 is a discussion of state regulation of issue of securities by an interstate railroad after congressional action in the same field. Another issue of state police power and federal commerce power is dealt with in Merritt Starr, "Navigable Waters of the United States—State and National Control," 35 HARV. L. REV. 154.

37 259 U. S. —, 42 Sup. Ct. 436 (1922).

38 258 U. S. —, 42 Sup. Ct. 328 (1922).

39 258 U. S. —, 42 Sup. Ct. 332 (1922).

Cummins amendments to the Interstate Commerce Act have taken the liability for defaults in interstate carriage of goods by railroad out of the control of the states and subjected it to the prescriptions of the congressional statute or of the common-law principles recognized and enforced by the federal courts. *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.*[40] and *New York v. United States*[41] hold that a valid federal regulation of intrastate railroad rates supersedes conflicting state regulation.

3. *State Taxation and Interstate Commerce*

It has long been established that state taxes on gross receipts from interstate transportation and state taxes measured by the volume of interstate transportation are obnoxious to the commerce clause. The validity of a West Virginia tax of two cents on each barrel of oil transported came before the court in *Eureka Pipe Line Co. v. Hallanan,*[42] and turned on the issue whether the transportation was intrastate or interstate. West Virginia oil was gathered into pipe lines without designation of its ultimate destination. The producer was given credit for the oil when delivered to the pipes. He could then receive the same quantity either within or without the state. The state contended that no interstate transportation began until an order for extra-state delivery was given. Justices Clarke, Pitney and Brandeis agreed with it, thinking that the contractual arrangements called for initial intrastate transportation, which was taxable, as distinct from the subsequent interstate transportation. The majority, speaking through Mr. Justice Holmes, declared that in a practical sense all oil ultimately delivered without the state was in course of interstate transportation from the moment it entered the pipes. Something was made of the fact that the pipes contained a continuous stream of oil physically making an interstate trip, but this seems unimportant in view of the recognition that the state charge could be imposed on such quantity of oil as a West Virginia producer ordered withdrawn from the pipes in West Virginia, even though the oil he had introduced into the pipes had gone to another state and the oil he extracted from the pipes had come from another state. The genuine issue was whether the character of the shipment

---

[40] 258 U. S. —, 42 Sup. Ct. 232 (1922).

[41] 258 U. S. —, 42 Sup. Ct. 239 (1922).

[42] 257 U. S. —, 42 Sup. Ct. 101 (1921). See 35 HARV. L. REV. 620.

depended upon the contract or the actual course of business. The former received three votes; the latter, six.

In *United Fuel Gas Co. v. Hallinan,*[43] decided on the same day, only Mr. Justice Brandeis remained recalcitrant, and his dissent may have been confined to the issue whether the case should have been heard on writ of error or certiorari. Mr. Justice Holmes again wrote the opinion of the court. The commodity here involved was natural gas of West Virginia origin, some of which went to West Virginia consumers, some to extra-state consumers, and some to connecting pipe lines which took the gas in West Virginia and delivered the greater part to extra-state consumers. The fact that the connecting pipe lines were free to dispose of the gas in West Virginia if they wished was deemed of no significance. The opinion makes clear that all gas which ultimately was consumed without the state was in interstate transportation from the beginning. Apparently there were not distinct contractual arrangements for the "gathering" and for the transportation, as in the *Eureka* case, for Mr. Justice Holmes says that "there is no break, no period of deliberation, but a steady flow as contemplated from the beginning beyond the state line."[44]

An Ohio citizen taxed by Ohio on his membership in the New York Stock Exchange saw fit to urge that the tax was a direct burden on interstate commerce, but in *Anderson v. Durr*[45] Mr. Justice Pitney, without bothering to inquire whether interstate commerce was involved, gave the short answer that "ordinary property taxation imposed upon property employed in interstate commerce does not amount to an unconstitutional burden upon the commerce itself."

An excise on a foreign corporation measured by its total capital stock was held valid in *Hump Hairpin Manufacturing Co. v. Emmerson,*[46] in which it appeared that all the property of the corporation was located in the taxing state. The case shows that the real vice of similar taxes held obnoxious to the commerce clause is that of

---

[43] 257 U. S. —, 42 Sup. Ct. 105 (1922).

[44] Phases of alleged state taxation of interstate commerce are considered in J. M. Landis, "The Commerce Clause as a Restriction on State Taxation," 20 MICH. L. REV. 50; Thomas Reed Powell, "State Income Taxes and the Commerce Clause," 31 YALE L. J. 799; and a note in 35 HARV. L. REV. 89 on state taxation of bills receivable from interstate commerce.

[45] 257 U. S. —, 42 Sup. Ct. 15 (1921).

[46] 258 U. S. —, 42 Sup. Ct. 305 (1922).

taking toll of extra-territorial values. The assessment under the Illinois statute in question was made by averaging the percentage of business transacted in Illinois with the percentage of tangible property there in order to find the proportion of capital employed in the state. The complainant made hairpins in Illinois, of which less than one-tenth found their way to the heads of Illinois ladies, much the greater part being sold to dealers outside the state. All contracts of sale had to be approved by the Chicago office and the state tax official assessed the tax on the assumption that the entire business was transacted in Illinois. Mr. Justice Clarke seemed to think that the statute and the tax official sought to "differentiate state from interstate business and to use only the former in determining the amount of the disputed tax," but this is not warranted by the phrase "business transacted in Illinois." The sales business there transacted was in large part interstate, as the court was aware. In sustaining the tax it was said that the question was a practical one depending for decision on the facts of each case. The fee of $6,045 with a total value of real and personal property in Illinois of $5,540,755.79, was said to be reasonable in amount and but slightly in excess of what would have been due had the business been neglected and the assessment based entirely on the property. Mr. Justice Van Devanter dissented and Mr. Justice McReynolds confined his concurrence to the result.[47]

In reviews of decisions for previous years attention has been called to the anomaly committed by the court in holding exempt from state taxation the sales in the original package of goods of extra-state origin, when sales by peddlers or auctioneers are not exempt and when the goods are subject to the general state property tax.[48] From Mr. Justice Pitney's opinion in *Texas Co. v. Brown*[49]

[47] The North Dakota tax on railroads, assessed according to the unit rule, which was declared invalid in Wallace v. Hines, 253 U. S. 66, 40 Sup. Ct. 435 (1920), 19 MICH. L. REV. 31, came before the Supreme Court again in Davis v. Wallace, 257 U. S. —, 42 Sup. Ct. 164 (1922), which reversed the district court for holding that a different assessment might be imposed under another section of the state statute.

[48] See 19 MICH. L. REV. 31-33, and 20 MICH. L. REV. 145-146. Askren v. Continental Oil Co., 242 U. S. 444, 40 Sup. Ct. 355 (1920), 19 MICH. L. REV. 32, is commented on in 4 ILL. L. Q. 50; Bethlehem Motors Corporation v. Flynt, 256 U. S. —, 41 Sup. Ct. 571 (1921), 20 MICH. L. REV. 147, in 20 MICH. L. REV. 229.

[49] 258 U. S. —, 42 Sup. Ct. 375 (1922).

it seems that this incongruous offspring is not destined to live a long life. In this case the district court had enjoined the imposition of fees on sales of oil in the original package in which it entered from without the state, but refused an injunction as to oil sold by breaking the package or oil brought in for indefinite storage. Only the complaining oil company appealed, so that the only issue before the Supreme Court was the rightfulness of taxing the storage and the sales not in the original package.[50] The state fees with respect to such oil were held constitutional, though in excess of the cost of inspection, on the ground that they involved no regulation of interstate commerce. In the course of the opinion Mr. Justice Pitney refers to earlier decisions sustaining the principle that "goods brought into a state, not from a foreign country but from another state, having reached their destination and being held in storage awaiting sale and distribution, enjoying the protection which the laws of the state afford, may, without violation of the commerce clause, be subjected to non-discriminatory state taxation, even though still contained in the original packages." A moment later he again refers to the same cases and continues: "But this carries equally the power to tax, without discrimination, domestic sales made of personal property similarly freed from interstate commerce, as is illustrated in *Woodruff v. Parham,* 8 Wall. 123, 140; *Wagner v. City of Covington,* 251 U. S. 95, 102, 103." Yet in the interim he had noted complainant's contention that another decision is "inconsistent with the imposition of inspection fees on a revenue basis upon goods brought in from another state, however held or

[50] After the interlocutory decree in the case and pending the appeal, the Georgia legislature passed an act declaring that the general statute in question should not be held or construed to apply to oils or other articles "imported into this state in interstate commerce and intended to be sold in the original and unbroken tank cars or other original receptacles or packages, and so sold, while the same are in interstate commerce." This, of course, made it easy to hold that the validity of the original statute as to sales not in interstate commerce should not be affected by possible invalidity as to other sales. It also deprived the court of any opportunity expressly to overrule its recent decisions exempting sales in the original packages of goods of extra-state origin, as the case before the court involved only relief by injunction which operates wholly *in futuro*. Whether such caution on the part of the state was necessary is questionable after Mr. Justice Pitney's opinion in the principal case.

disposed of," and dismissed it by saying: "That decision, however, extended the exemption from such fees of goods brought from state to state no further than 'while the same are in the original receptacles or containers in which they are brought into the state.'" Such exemption the complainant had acquired from the court below, and it was no longer in issue. What Mr. Justice Pitney says in his ensuing paragraph, already quoted, is inconsistent with that exemption and with the recent Supreme Court decisions on which it is based. The inconsistency cannot be resolved by drawing a distinction between a general state sales tax on all commodities and a special one on the sale of selected commodities, because plainly by "discrimination" Mr. Justice Pitney means discrimination against interstate commerce, not discrimination against particular commodities, since he says that "the fact that no goods of the like kind are produced within the taxing state, and that necessarily all have come from other states, is not of itself sufficient to show a discrimination against interstate commerce." In the case at bar the inspection was made when the tank cars arrived, and the fees, concededly a source of revenue, were then payable. Such arrival was held not to "amount to 'coming to rest within the state' authorizing state taxation." The opinion then proceeded:

"And although the state may tax the first domestic sale of the products, or tax them upon their storage in stationary tank awaiting sale, it may not, without consent of the owner, impose its power upon the products while yet in the tank car, but must resort to other means of collection, if need be.

"The evidence strongly tends to show that it may be more convenient to plaintiff that inspection before unloading of tank cars, as heretofore practiced, be continued; and there is no objection to this, if done with plaintiff's free consent. Aside from this, the authority of defendants to tax the products or their storage or sale commences when they have come to rest; ordinarily, when transferred from the tank car to the storage tank and added to plaintiff's stock in trade kept therein for local distribution and sale."